IBIG @ DAVID RAMPAS & ANOR v. TERISAH BAHAN & ORS

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
PRASAD SANDOSHAM ABRAHAM JCA
ZALEHA YUSOF JCA
[CIVIL APPEAL NO: S-02-2038-12-2014]
15 JULY 2016

CIVIL PROCEDURE: *Res judicata – Applicability – Issue as to whether appellants were lawful shareholders and directors of company had been determined in earlier judgment – Whether judgment binding – Whether parties had notice of judgment – Whether judgment proved to be irregular and defective – Whether undesirable to allow matter to be re-litigated – Whether tantamount to abuse of process of court – Whether there was lack of sufficient and judicial appreciation of issues*

CIVIL PROCEDURE: *Proof – Onus of proof – Respondents sought rectification to remove appellants' names from share registry – Whether respondents seeking to restore their names to registry ought to prove ownership – Whether Judicial Commissioner erred when reversing onus of proof onto appellants – Whether there was lack of sufficient and judicial appreciation of issues*

This was an appeal against the decision of the Judicial Commissioner ('JC') allowing, *inter alia*, the first to fourth respondents' claim to remove the name of the appellants and restore the names of the first to fourth respondents as shareholders of the fifth respondent. The first to fourth respondents were the registered owners of 100% of the issued and paid up capital of the fifth respondent comprising of 1,000 ordinary shares. On 31 January 2007, the first respondent in her capacity as a director of the fifth respondent wrote to the Land and Surveys Department to renew an offer to alienate a piece of land ('the said land'). Inquiries were subsequently made and they discovered that the offer to alienate the said land had been renewed by someone else. It was found that the names of the shareholders and director of the fifth respondent had been changed to the first and second appellants. It was the appellants' case that they were *bona fide* purchasers of the said land when they purchased the shares from one Onong Wan ('Onong') and one Monnah Guring ('Monnah') who had become the directors of the fifth respondent in place of the first to fourth respondents. On 14 October 2008, both the appellants were appointed as directors of the company and on the same date, Onong and Monnah transferred their shares in the company to the two appellants. The first to fourth respondents then filed the present suit, seeking amongst others, a declaration that the first to fourth respondents were the lawful owner of the shares of the fifth respondent. The appellants filed their defence and counterclaimed against the first to fourth respondents seeking for damages and declaration, *inter alia*, that the first to fourth respondents had ceased to be directors of the fifth respondent. The High Court, in allowing the first to fourth respondents' claim and dismissing the appellants'

counterclaim, was of the view that the appellants had failed to show that they were *bona fide* purchasers for value. The appellants in this appeal submitted that the issue of whether the appellants were the director and shareholders of the fifth respondent was *res judicata* as the High Court in originating summons K 24-40-2010-III had given judgment declaring that the appellants were at all material time the lawful shareholders and director of the fifth respondent. The appellants further contended that the JC had clearly erred in law when reversing the onus of proof onto the appellants to show that Onong and Monnah had legitimately purchased the shares from the first to fourth respondents. In reply, the first to fourth respondents argued that they were not parties to the said originating summons and thus the judgment was not binding on them and that the existence of the judgment could not in law give rise to *res judicata*.

Held (allowing appeal; setting aside decision of High Court with costs)
Per Zaleha Yusof JCA delivering the judgment of the court:

(1) The originating summons which resulted in the 27 April 2010 judgment was filed by the fifth respondent against the six defendants to rectify its register of shareholders/members and directors. By that judgment, both the appellants had been declared as lawful shareholders and directors of the fifth respondent. The fifth respondent, being a party to that judgment, was therefore obviously bound by it. Consequently, the JC ought not to have granted any order which was inconsistent with that judgment. (para 24)

(2) Although the first to fourth respondents were not parties to the originating summons action but nevertheless they had notice of the said judgment and for some five months prior to the filing of the present action, the first to fourth respondents failed to intervene and set aside the said judgment. It was clearly wrong for the first to fourth respondents to now try to challenge the said judgment in this action by arguing that it was irregular and defective. They should have applied to set it aside in its original action. The failure of the first to fourth respondents to do so was fatal to their claim herein. (paras 23 & 25)

(3) The first to fourth respondents were parties in another suit between the first to fourth respondents and Klebang Plantation Sdn Bhd ('Klebang') before Azhari Kamal JC. By his decision, Azhari Kamal JC had made a similar finding that the issue of who owns the shares in the fifth respondent had already been decided in favour of the appellants by the originating summons. The first to fourth respondents were in essence seeking to declare that the transaction entered by the fifth respondent through the appellants in respect of the land with Klebang was invalid, null and void. The first to fourth respondents had alleged that the appellants were not the legitimate and lawful directors of the fifth respondents and therefore lacked the authority and capacity to authorise or cause the fifth respondent to enter into the agreement with Klebang.

Azhari Kamal JC found that the issue having been decided, had a bearing on the *locus standi* of the first to fourth respondents and held that the bringing of the action by the first to fourth respondents was plainly and obviously vexatious and an abuse of the process of the court and the action was struck out. By these two decisions, namely the 27 April 2010 judgment and Azhar Kamal JC's decision, the matter now was clearly *res judicata*. The issue of who were and are the lawful shareholders and directors of the fifth respondent had been determined twice, it was undesirable to allow that it be relitigated for the third time, which would tantamount to an abuse of the process of the court. (paras 26, 28, 29, 30 & 33)

(4) The appellants were already on the share register of the fifth respondent. The first to fourth respondents admitted to this fact when they recognised that from documents or records lodged, that Onong and Monnah were recorded as being the sole shareholder of the fifth respondent in 1983. They recognised that the appellants' names were already on the share register and that their names had to be removed when they sought rectification of the share register of the fifth respondent to remove the appellants' names as shareholders and to restore the first to fourth respondents to the register. Hence, the onus was crystal clear on the first to fourth respondents to prove their ownership. The JC had therefore misdirected himself when he imposed the onus onto the appellants whose names were already on the register. The JC erred in law in not having sufficient and judicial appreciation of the issues. (paras 35 & 36)

***Bahasa Malaysia** Headnotes*

Ini adalah rayuan terhadap keputusan Pesuruhjaya Kehakiman ('PK') membenarkan, antara lain, tuntutan responden pertama hingga responden keempat untuk membatalkan nama-nama perayu dan untuk mengembalikan nama-nama responden pertama hingga responden keempat sebagai pemegang saham responden kelima. Responden pertama hingga responden keempat adalah pemilik berdaftar 100% modal berbayar dan diisukan responden kelima yang mengandungi 1,000 saham biasa. Pada 31 Januari 2007, responden pertama dalam kapasitinya sebagai pengarah responden kelima telah menulis surat kepada Jabatan Tanah dan Survei untuk memperbaharui satu tawaran pengasingan sebidang tanah ('tanah tersebut'). Pertanyaan dibuat kemudiannya dan mereka mendapati bahawa tawaran pengasingan tanah tersebut diperbaharui oleh pihak lain. Didapati juga bahawa nama-nama pemegang saham dan pengarah responden kelima telah ditukar ke nama perayu pertama dan kedua. Kes perayu-perayu adalah bahawa mereka adalah pembeli *bona fide* tanah tersebut apabila mereka membeli saham-saham daripada Onong Wan ('Onong') dan Monnah Guring ('Monnah') yang menjadi pengarah-pengarah responden kelima menggantikan tempat responden pertama hingga responden keempat. Pada 14 Oktober 2008,

kedua-dua perayu dilantik sebagai pengarah syarikat dan pada tarikh yang sama, Onong dan Monnah memindahkan saham-saham mereka dalam syarikat kepada kedua-dua perayu. Responden pertama hingga responden keempat kemudian memfailkan guaman ini, dan memohon antara lain, satu perisytiharan bahawa responden pertama hingga responden keempat adalah pemilik sah saham-saham responden kelima. Perayu-perayu memfailkan pembelaan dan menuntut balas terhadap responden pertama hingga responden keempat dan menuntut ganti rugi serta perisytiharan, antara lain, bahawa responden pertama hingga responden keempat bukan lagi pengarah-pengarah responden kelima. Mahkamah Tinggi, dalam membenarkan tuntutan responden pertama hingga responden keempat dan menolak tuntutan balas perayu-perayu, berpandangan bahawa perayu-perayu gagal menunjukkan mereka adalah pembeli *bona fide* untuk satu nilai. Perayu-perayu dalam rayuan ini menghujahkan bahawa isu sama ada perayu-perayu adalah pengarah dan pemegang saham responden kelima adalah *res judicata* kerana Mahkamah Tinggi dalam saman pemula K 24-40-2010-III telah memberikan penghakiman mengisytiharkan bahawa perayu-perayu pada setiap waktu material adalah pemegang saham dan pengarah sah responden kelima. Perayu-perayu seterusnya menghujahkan bahawa PK terkhilaf dari segi undang-undang apabila meletakkan beban membuktikan ke atas perayu-perayu untuk menunjukkan bahawa Onong dan Monnah telah secara sah membeli saham-saham daripada responden pertama hingga responden keempat. Sebagai balasan, responden pertama hingga responden keempat menghujahkan bahawa mereka bukan pihak kepada saman pemula tersebut dan oleh itu, penghakiman tidak mengikat mereka dan kewujudan penghakiman itu tidak, dari segi undang-undang, membangkitkan *res judicata*.

Diputuskan (membenarkan rayuan; mengetepikan keputusan Mahkamah Tinggi dengan kos)

Oleh Zaleha Yusof HMR menyampaikan penghakiman mahkamah:

(1) Saman pemula yang menghasilkan penghakiman 27 April 2010 difailkan oleh responden kelima terhadap enam defendan bagi memperbetulkan daftar pemegang saham/ahli-ahli dan pengarah-pengarah. Melalui penghakiman itu, kedua-dua diisytiharkan sebagai pemegang saham dan pengarah sah responden kelima. Responden kelima, sebagai pihak kepada penghakiman itu, adalah terikat. Dengan itu, PK tidak sepatutnya membenarkan apa-apa perintah yang tidak konsisten dengan penghakiman itu.

(2) Walaupun responden pertama hingga responden keempat bukan pihak kepada tindakan saman pemula tetapi mereka mempunyai notis berkenaan penghakiman tersebut dan lima bulan sebelum memfailkan tindakan ini, responden pertama hingga responden keempat gagal mengubah atau mengetepikan penghakiman tersebut. Jelas salah untuk responden pertama hingga responden keempat untuk sekarang mencabar penghakiman tersebut dalam tindakan ini dengan dakwaan bahawa ia

adalah tidak teratur dan defektif. Mereka sepatutnya memohon untuk mengetepikannya dalam tindakan aslinya. Kegagalan responden pertama hingga responden keempat berbuat demikian menjejaskan permohonan mereka.

(3) Responden pertama hingga responden keempat adalah pihak kepada guaman yang lagi satu antara responden pertama hingga responden keempat dan Klebang Plantation Sdn Bhd ('Klebang') di hadapan Azhari Kamal PK. Melalui keputusannya, Azhari Kamal PK telah membuat dapatan yang sama bahawa isu siapa yang memiliki saham dalam responden kelima telah diputuskan memihak kepada perayu-perayu oleh saman pemula. Responden pertama hingga responden keempat pada dasarnya menuntut perisytiharan bahawa transaksi yang dimasuki oleh responden kelima melalui perayu-perayu berkenaan tanah dengan Klebang adalah tidak sah dan terbatal. Responden pertama hingga responden keempat mendakwa bahawa perayu-perayu adalah pengarah yang tidak sah responden kelima dan dengan itu tidak mempunyai kuasa dan kapasiti untuk membenarkan atau menyebabkan responden kelima memasuki perjanjian dengan Klebang. Azhari Kamal PK mendapati bahawa isu tersebut telah diputuskan, dan mempengaruhi *locus standi* dan memutuskan bahawa pembawaan tindakan ini oleh responden pertama hingga responden keempat adalah dengan jelasnya menyusahkan dan satu penyalahgunaan proses mahkamah dan tindakan ini dibatalkan. Melalui kedua-dua keputusan ini, iaitu penghakiman 27 April 2010 dan keputusan Azhar Kamal PK, perkara ini adalah jelasnya *res judicata*. Isu siapa pemegang saham dan pengarah sah responden kelima telah pun diputuskan dua kali, dengan itu adalah tidak menyenangkan untuk perkara ini dilitigasi semula untuk kali ketiga, yang akan berjumlah kepada satu penyalahgunaan proses mahkamah.

(4) Perayu-perayu sudah disenaraikan dalam daftar saham responden kelima. Responden pertama hingga responden keempat mengakui fakta ini apabila mereka mengiktirafkan dokumen atau rekod yang telah dibuat, bahawa Onong dan Monnah direkodkan sebagai pemegang saham tunggal responden kelima pada tahun 1983. Mereka mengiktirafkan bahawa nama-nama perayu sudah terdapat dalam daftar saham dan bahawa nama-nama mereka telah dibatalkan apabila mereka menuntut pembetulan daftar saham responden kelima untuk membatalkan nama-nama perayu sebagai pemegang saham dan mengembalikan responden pertama hingga responden keempat ke dalam daftar. Oleh itu, tanggungjawab adalah jelas ke atas responden pertama hingga responden keempat untuk membuktikan pemilikan. PK, dengan itu, tersalah arah apabila meletakkan beban ke atas perayu-perayu yang nama mereka sudah pun terdapat dalam daftar. PK terkhilaf dari segi undang-undang apabila tidak mempertimbangkan dengan sewajarnya dan secara kehakiman isu-isu yang berbangkit.

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Benjamin Wong Peng Yan v. Genting Bhd & Anor [1994] 1 CLJ 351 HC ***(refd)***

Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***

Kheng Chwee Lian v. Wong Tak Thong [1983] 2 CLJ 191; [1983] CLJ (Rep) 195 FC ***(refd)***

Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd [1987] 2 CLJ 290; [1987] CLJ (Rep) 160 SC ***(refd)***

Majujaya Holdings Sdn Bhd v. Pens-Transteel Sdn Bhd & Ors [1998] 3 CLJ 202 CA ***(foll)***

Puah Bee Hong @ Bee Hong (F) & Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Robert Teo Keng Tuan, Intervener) & Another Case [1994] 2 CLJ 705 SC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 13 r. 6

Other sources(s) referred to:

Alexander Kingcome Turner, *The Doctrine of Res Judicata,* 2nd edn, p 42, para 46

For the appellant - Chung Jiun Dau & Sonny Durai; M/s Allion Kitingan & Partners
For the respondent - Saiful Azian Mokhtar & Marzuki Spawi; M/s Marzuki Spawi & Co

[Editor's note: For the High Court judgment, please see Terisah Bahan & Ors v. Kedatuan Sdn Bhd & Ors [2013] 1 LNS 1110 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Zaleha Yusof JCA:

[1] This is an appeal against the decision of the learned Judicial Commissioner (JC) of the High Court at Kota Kinabalu dated 24 October 2014, allowing, *inter alia*, the first to fourth respondents' (plaintiffs in the High Court) claim to remove the name of the appellants and restore the names of the first to fourth respondents as shareholders of the fifth respondent; in the share register.

Brief Facts

[2] The first to fourth respondents and two others, Koh Han Ting (Koh) and Nikomedis Binin (Nikomedis), were the registered owners of 100% of the issued and paid up capital of the fifth respondent comprising of 1,000 ordinary shares.

[3] Sometimes in 1980, the State of Sabah offered to alienate a parcel of land situated in the District of Kota Belud and measuring approximately 2,000 acres ("the said land") to the fifth respondent. Such offer was duly accepted by the fifth respondent but at that time the fifth respondent did not have the fund to pay for the necessary land premium.

[4] On 31 January 2007, the first respondent in her capacity as a director of the fifth respondent wrote to the Land & Surveys Department to renew the offer to alienate the said land. Another reminder was duly sent on 28 January 2009.

[5] Inquiries were subsequently made and they discovered that the offer to alienate the said land had been renewed by someone else. It was found that the names of the shareholders and director of the fifth respondent had been changed to the first and second appellants.

[6] It was the case of the appellants that they were *bona fide* purchasers of the said land when they purchased the shares from one Onong bin Wan @ Fedelis Huan ("Onong") and one Monnah bte Guring ("Monnah"). Onong and Monnah, according to the records of the company, had become directors of the fifth respondent in place of the first to fourth respondents and Koh and Nikomedis. The records show that Onong and Monnah are the only shareholders and directors of the company and the substantial asset for the company is the said land.

[7] It is also the appellants' case that by a letter dated 10 July 2008, the Land and Surveys Department made a fresh offer to alienate the land ("fresh offer letter") to the company and accepted by the company through Onong and Monnah. According to the fresh offer letter, it superseded the offer in 1980.

[8] Following the acceptance of the fresh offer letter, the company entered into a sale and purchase agreement dated 8 July 2008 to sell the land to the first appellant and also gave a Power of Attorney to the first appellant to deal with the land.

[9] The first appellant paid the premium for the land to the Land & Surveys Department.

[10] On 14 October 2008, both the appellants were appointed as directors of the company in place of Onong and Monnah. On the same date, Onong and Monnah executed the share transfer forms (Form 32A) to transfer their shares in the company to the two appellants.

[11] The first to fourth respondents then filed the present suit, seeking amongst other things, a declaration, that the first to fourth respondents are the lawful owners of the shares of the fifth respondent; and the appellants do not have any interest whatsoever in the fifth respondent.

[12] The appellants filed their defence and counterclaimed against the first to fourth respondents seeking for damages and declaration, *inter alia*, that the first to fourth respondents and Nikomedis Binin have ceased to be directors of the fifth respondent and the appellants are *bona fide* purchasers of the 100% of the issued and fully paid up shares in the fifth respondent.

A **Findings Of The High Court**

[13] The High Court allowed the first to fourth respondents' claim and dismissed the appellants' counterclaim.

[14] The learned JC was of the view that the appellants had failed to show
B that they were *bona fide* purchasers for value. Although His Lordship agreed with learned counsel for the appellants that the Companies Commission of Malaysia (SSM) record showed that both Onong and Monnah were the owner of the shares and they had sold the same to the appellants; however this was merely *prima facie* evidence. Those documents could not be the only
C indicators to show whether the appellants were the *bona fide* purchasers for value without notice. His Lordship felt that the appellants had failed to prove that they were *bona fide* purchasers for value without notice as there was no evidence of payment of the purchase price; there were questionable documentary evidence and the appellants did not call Onong and Monnah to explain.

D **Our Decision**

[15] There were many issues raised by the parties but we felt of much importance were issues on *res judicata* and onus of proof. Learned counsel for the appellants submitted that the issue of whether the appellants are director
E and shareholders of the fifth respondent was *res judicata* as the High Court at Kota Kinabalu in Originating Summon No. K 24-40-2010-III had given a judgment dated 27 April 2010 which declared the appellants "... at all material time were and are the lawful shareholders and director ..." of the fifth respondent. Learned counsel for the appellants further contended that
F the JC had clearly erred in law when His Lordship reversed the onus of proof onto the appellants to show that Onong and Monnah had legitimately purchased the shares from the first to fourth respondents; and although not expressly stating so; His Lordship appeared to draw an adverse inference against the appellants for failing to call Onong and Monnah as witnesses.

G **[16]** In reply, learned counsel for the first to fourth respondents argued that the said judgment is not binding on the first to fourth respondents for the simple reason that the first to fourth respondents were not parties to the said originating summons and that the judgment was not decided based on the merits of the case. He cited the case of *Kheng Chwee Lian v. Wong Tak Thong*
H [1983] 2 CLJ 191; [1983] CLJ (Rep) 195; [1983] 2 MLJ 320, wherein His Lordship Wan Suleiman FJ said:

> **In our judgement, the court below has no jurisdiction inherent or otherwise, over any person other than those properly brought before it**, as parties or as persons treated as if they were parties under statutory
I provisions [*Brydges v. Brydges & Wood* [1909] P 187 Re Shephard [1920] P 71 and *Coleman v. Coleman* (1933-34) 61 IA 115]. **The terms "judgement" and "order" in the widest sense may be said to include any decision given by a court on a question or questions at issue between the parties to a**

proceeding properly before the court [see para 501 *Halsbury Laws of England* (4th ed) Vol. 26 at page 237]. And at para 550 the following passages appear:

> Subject to appeal and to being amended or set aside, **a judgement is conclusive as between the parties and their privies** and is conclusive evidence against all the world of its existence, date and legal consequences.
>
> (emphasis added)

[17] Since the first to fourth respondents herein were not parties to the judgment, he argued, the existence of the judgment cannot in law give rise to *res judicata*. Further, the judgment was not decided based on the merits of the claim but rather in default of the defendants in that earlier originating summons in entering appearance. It was merely a judgment or decision obtained by default of appearance. He further submitted that the judgment was manifestly wrong, irregular and defective as it was in breach of O. 13 r. 6 of the old Rules of the High Court 1980; hence it is of no effect.

[18] Learned counsel for the first to fourth respondents also submitted that the learned JC was correct to first place the burden on the respondents to prove that the respondents were the owners of the shares and that the respondents did not sell their shares; as it is the appellants' pleaded defence that they were *bona fide* purchasers for value of the shares which the appellants claimed they purchased from both Onong and Monnah, without notice of the first to fourth respondents' interest.

[19] Upon scrutinising the grounds of judgment of the learned JC, we found that the issue of *res judicata* had not been considered by His Lordship although it is indeed an important issue and had been raised by the appellants in their defence as well as submissions in the High Court. Although the word "*res judicata*" was not specifically used, the said judgment of 27 April 2010 was pleaded in para. 11.13 of the appellants' amended defence. It was also raised as an issue for determination in para. 37(c) of the appellants' written submission before the learned JC.

[20] Indeed, there is no dispute that the judgment of 27 April 2010 was a default judgment. However, it is trite that a judgment, *albeit* a default judgment, shall remain valid until it is set aside. As cited by learned counsel for the appellants, in *Puah Bee Hong @ Bee Hong (F) & Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor. (Robert Teo Keng Tuan, Intervener) & Another Case* [1994] 2 CLJ 705; [1994] 2 MLJ 601 at p 713 (CLJ); p. 610 (MLJ), the Supreme Court stated:

> We are of the considered view that an order of a superior court such as the High Court, even if it is eg, an order obtained *ex parte* or a default judgement; until it is set aside, must be obeyed by everyone whether its validity is challenged or not, and 'it is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until the order is

A discharged', per Romer LJ in *Hadkinson v. Hadkinson*. This passage was quoted with approval and adopted by this court in *Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd*. It was stated in *Isaacs v. Robertson* that it was misleading to describe such an order of competent jurisdiction as void or voidable, for every order must be obeyed until it was set aside and 'these are not orders which are void *ipso facto* without the need for proceedings B to set them aside'. One of the reasons is that such a superior court must be presumed to have the jurisdiction to make an order which it has made. Every order made by a superior court must be regarded as an order of competent jurisdiction.

[21] Again, on the issue of default judgment, the Federal Court in the recent C case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987, FC held as follows:

[11] Given that alleged fraud passed wholly unanswered by the first to fourth respondents, the trial court 43AR was wholly warranted to hold that with default judgment against the first to fourth respondents, fraud D by them needed not to be proved by the appellants. But later, the trial court expressed an inconsistent opinion. At 52AR, the trial court held, so as to distinguish *Tan Ying Hong*, that the default judgement was not a specific finding that the first to fourth respondents committed fraud in the distribution of the estate of the deceased to themselves. With respect, the judgment was the judicial decree that fraud by the first to fourth E respondents had been made out. The cause of action of the appellants against the first to fourth respondents was fraud in the distribution of the estate of the deceased. When judgment was entered against the first to fourth respondents, all allegations of fraud which gave rise to the cause of action merged in the judgment (see *Distillers Co Bio-Chemicals (Australia) Pty Lyd v. Ajax Insurance Co Ltd* (1974) 2 ALR 321, where the High Court F of Australia per Menzies J said "... the plaintiff's cause of action against the insured would merge in the judgment once it was obtained ...") and the rights of the appellants to relief became rights to enforce the judgment (see *Liaw Watt Lee & Ors v. Baiduri Bank Bhd and Another Appeal* [2010] 5 MLJ 551, where the Brunei Court of Appeal per Power PCA expressed "that generally when judgment is given in an action, the original causes G of action merge in the judgment; the plaintiff's rights to relief as expressed in the statement of claim are extinguished and become rights to enforce the judgment instead"). Until set aside, the default judgment was the incontestable proof of fraud the first to fourth respondents.

[22] By arguing that the said judgment of 27 April 2010 is irregular and H defective, the first to fourth respondents seem to now trying to challenge it in this action. In *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393, Peh Swee Chin FCJ had at p. 103 (CLJ); pp. 417-418 (MLJ), stated the following:

I It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside on valid grounds, but without doing so, one cannot attack its invalidity laterally by raising an objection to its invalidity in any

> other proceedings, without filing proceedings for applying to have it set aside first. When one wishes to file such proceedings to so set it aside, one must do so within the same proceedings or action in which the same order was obtained and not in a separate fresh proceeding or new action.

[23] Based on that decision of the Federal Court, it is clearly wrong for the first to fourth respondents to now trying to challenge the said judgment in this action by arguing that it is irregular and defective. They should have applied to set it aside in its original action ie, the Originating Summons No. K24-40-2010-III action. We took note that sometimes in 2013, they had also unsuccessfully attempted to, some 3 1/2 years after the judgment was entered, amend the statement of claim in the present action to include a prayer to set aside the judgment dated 27 April 2010.

[24] The originating summons which resulted in the 27 April 2010 judgment was filed by the fifth respondent against six defendants to rectify its register of shareholders/members and directors; as these were claims by the defendants in that case that they were shareholders and directors. By that judgment, both the appellants had been declared as lawful shareholders and directors of the plaintiff ie, the fifth respondent herein. The fifth respondent, being a party to that judgment of 27 April 2010, is therefore obviously bound by it. Consequently, we opine that since the fifth respondent itself is bound by the judgment, the learned JC ought not to have granted any order which is inconsistent with that judgment.

[25] Although the first to fourth respondents were not parties to the originating summons action but nevertheless they had notice of the said judgment and for some five months prior to the filing of the present action, the first to fourth respondents failed to intervene and set aside the said judgment. The failure of the first to fourth respondents to set aside the said judgment, in our view, is fatal to their claim herein.

[26] This present case was heard before the learned JC from 24 to 29 August 2014 and decision was given on 24 October 2014. Before this case was even heard and disposed of, in another suit before Azhari Kamal JC in Kota Kinabalu High Court Suit No. BKI-22-85-7-2013 between the first to fourth respondents herein and Klebang Plantation Sdn Bhd as the first defendant therein; and the fifth respondent and the appellants herein as the second, third and fourth defendants respectively, the learned Azhari Kamal JC had given a decision on 15 January 2014 wherein His Lordship had made a finding of fact at p. 7, *inter alia*:

> In fact, the case No. K24-40-2010-111, the Court had made its decision on the issue of ownership of the shares on the 2nd defendant in favour of the 3rd and 4th defendants herein. This, in my opinion, has a bearing in the issue of *Locus Standi* of the plaintiff in bringing this action as well as the issue on the legality of the dealing in the said Land between the 1st and the 2nd defendant.

[27] The first to fourth respondents had filed an appeal against the said decision *vide* Court of Appeal Civil Appeal No. S-02(1M)-285-02-2014, but the appeal was struck out on 19 May 2014 with costs of RM5,000 and they did not file any further appeal on the matter.

[28] If in the 27 April 2010 judgment, the first to fourth respondents were not parties, in this later 15 January 2014 decision, they were definitely parties. By his decision, the learned Azhari Kamal JC had also made a similar finding that the issue of who owns the shares in the fifth respondent had already been decided in favour of the appellants by the judgment dated 27 April 2010 in Originating Summons No. K24-40-2010-III. Before the learned Azhari Kamal JC, the first to fourth respondents were in essence seeking to declare that the transaction entered by the fifth respondent through the appellants in respect of the land with Klebang Plantation Sdn Bhd was invalid, null and void. The first to fourth respondents alleged that the appellants were not the legitimate and lawful directors of the fifth respondents and therefore lack the authority and capacity to authorise and or cause the fifth respondent to enter into the agreement with Klebang Plantation Sdn Bhd.

[29] The learned Azhari Kamal JC had found that the issue having been decided, had a bearing on the *locus standi* of the first to fourth respondents bringing the suit as well as the legality of the transaction between Klebang Plantation Sdn Bhd and the fifth respondent. Accordingly the learned Azhari Kamal JC held that the bringing of the action by the first to fourth respondents was "plainly and obviously vexatious and an abuse of the process of the court" and the action was struck out.

[30] By these two decisions, namely the 27 April 2010 judgment and Azhari Kamal JC's decision, we are of the view that the matter before us now is clearly *res judicata*.

[31] What is *res judicata* had been explained at length by the Supreme Court in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 at 791; [1995] 3 MLJ 189 at 197:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an *estoppel per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation – *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari pro eadem causa*.

[32] Abdul Malek J (as he then was) in the case of *Benjamin Wong Peng Yan v. Genting Bhd & Anor* [1994] 1 CLJ 351 at p. 356; [1993] 3 MLJ 713 at p. 722 reading from the passage from "*The Doctrine of Res Judicata*" (2nd edn), originally authored by George Spencer Bower with the 2nd edn by Sir Alexander Kingcome Turner said:

> The first, at para 46 at p 42 states:
>
> > A judgment or order by default is *prima facie* just as much a judicial decision in favour of the plaintiff as any other judgment or order, whether the default of the defendant was in appearance to the writ, or in pleading, or in appearance at the trial or hearing, or in prosecution of, or resistance to, an appeal.
>
> The second footnote on the same page reads:
>
> > In *Ker v. Williams* (1885) 29 Sol Jo 681 CA, the dismissal of an action on default of appearance at the trial was held to be a "judgment" which operated as an estoppel to the plaintiff (per Lindley LJ p 681 and at page 724:
>
> For *res judicata*, the parties need not be the same. It had been so held in *North West Water Ltd v. Binnie & Partners (a firm)* that:
>
> > Where an issue had for all practical purposes been decided in a court of competent jurisdiction the court would not allow that the issue to be raised in separate proceedings between different parties arising out of identical facts and dependent on the same evidence, since not only was the party seeking to relitigate the issue prevented from doing so by issue estoppel but it would be an abuse of process of allow the issue to be relitigated. It followed that since the issue of negligence had already been determined against the consultant engineers in the first action they were estopped from denying negligence and further it would be an abuse of process if they were to be permitted to deny negligence. Their defence denying negligence would accordingly be struck out.

[33] We feel as the issue of who were and are the lawful shareholders and directors of the fifth respondent had been determined twice, it is undesirable to allow that it be relitigated for the third time. To allow such would not only tantamount to an abuse of the process of the court but also could embarrass all parties involved, including this court and SSM. (See the decision of the Supreme Court in *Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd* [1987] 2 CLJ 290; [1987] CLJ (Rep) 160; [1988] 2 MLJ 184.)

[34] Next is the issue of onus of proof. In *Majujaya Holdings Sdn Bhd v. Pens-Transteel Sdn Bhd & Ors* [1998] 3 CLJ 202 at 224; [1998] 2 MLJ 399 at 419, the Court of Appeal stated that:

> In cases where the applicant is already on the register, he is entitled as a matter of law to remain there until he has transferred his shares or has been diverted of his right to be there by a court order. Contrary to the submission of counsel for the respondents, there is no onus on the

registered shareholder to prove his ownership because the law presumes he has a right to be on the register. In this case, the trial judge misdirected himself by reversing the onus.

[35] It is without doubt and it is undisputed that the appellants are already on the share register of the fifth respondent, the company. The learned JC admitted this. The first to fourth respondents also admitted to this fact when in paras. 2 to 3 of their amended reply and amended defence to counterclaim they recognised that from documents or records lodged with SSM, that Onong and Monnah were recorded as being the sole shareholder of the fifth respondent in 1983. They recognised that appellants' names were already on the share register and that their names had to be removed when they sought for rectifications of the share register of the fifth respondent to remove the appellants' names as shareholders and to restore the first to fourth respondents as ones. Hence, following the decision of the Court of Appeal in *Majujaya Holdings*, *supra*, the onus is crystal clear on the first to fourth respondents to prove their ownership. The learned JC had therefore clearly misdirected himself when he imposed the onus onto the appellants whose names were already on the register. This can be seen from His Lordship grounds of judgment at pp. 22, 53 and 54 of the supplementary record of appeal.

> Surely since the 2nd and 3rd defendants say that they bought their shares from Onong and Monnah, it is incumbent upon the 2nd and 3rd defendants to show that they were *bona fide* purchasers of their shares.
>
> Onong and Monnah are important and essential witnesses and their evidence are very crucial to the unfolding of the narrative, how they had acquired their shares from the plaintiffs and how they transferred the same to the 2nd and 3rd defendants.
>
> I am of the opinion that the 2nd and 3rd defendant should have called Onong and Monnah as witnesses.

[36] In the light of the above grounds, we unanimously found there were merits in this appeal. With due respect to the learned JC, we found there was clearly a misdirection on His Lordship's part on principles of *res judicata* and onus of proof. In fact, His Lordship seemed to have shunned the issue of *res judicata* completely. Hence, we felt that the learned JC erred in law in not having sufficient and judicial appreciation of this issue. We, therefore, allowed the appeal and set aside the decision of the High Court with costs.